STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 23, 2005
V	No. 255290 Wayne Circuit Court
STEVEN DOUGLAS PHILLIPS, Defendant-Appellant.	LC No. 03-013658

Before: Sawyer, P.J., and Markey and Murray, JJ.

PER CURIAM.

Defendant appeals by right his bench trial convictions of felonious assault, MCL 750.82, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to two years' probation for the felonious assault conviction and two years in prison for the felony-firearm conviction. We affirm.

Defendant was convicted of shooting another man in the face after they had an argument in the street. The victim was the only witness to the shooting. Defendant first argues on appeal that there was insufficient evidence identifying him as the shooter. We disagree.

When reviewing a claim of insufficient evidence, this Court reviews the record de novo. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). This Court reviews the evidence in the light most favorable to the prosecutor and determines whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Fennell*, 260 Mich App 261, 270; 677 NW2d 66 (2004).

Defendant claims that the testimony of the victim was too biased to be believed, particularly given that there was no corroborating evidence implicating defendant. He notes the past conflict between the two men and suggests the victim blamed defendant for the shooting out of animus.

In appeals challenging the sufficiency of the evidence, questions of witness credibility are left to the trier of fact, not the reviewing court. *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999). The trial court explicitly credited the victim's version of events in its entirety after hearing testimony that detailed his possible bias and the past conflict between the two men. The trial court also specifically discredited the testimony of defendant's alibi witnesses. These

findings are squarely within the purview of the trier of fact, who has the opportunity to observe the demeanor of witnesses at trial. It is not our role to disturb credibility determinations.

Furthermore, the victim had known defendant by sight for years and recognized him on the clear afternoon of the shooting. He also identified defendant two more times shortly after the shooting, once to a police officer at the scene and later to a police investigator at the hospital. Finally, the victim's version of events was corroborated by pictures and observations of his injuries. Blood on the street lead from the scene of the shooting to the victim's home. The victim also testified that defendant damaged his car just before the shooting, and there was, in fact, recent damage to the car. The testimony and corroborating evidence was sufficient for a rational trier of fact to find defendant guilty of felonious assault.

Defendant next argues that his conviction should be reversed because the trial court erred by admitting hearsay evidence which seriously affected the fairness of the proceedings. We disagree. Defendant did not object to the testimony during trial, which is generally required to preserve the issue for appeal. MRE 103(a)(1); *People v Griffin*, 235 Mich App 27, 44; 597 NW2d 176 (1999). But, an unpreserved issue may be reviewed under the plain error rule. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). To avoid forfeiture under the plain error rule, there must be an error that is clear or obvious and that affected defendant's substantial rights. *Id.* at 763-764.

Defendant argues the court erred in allowing hearsay testimony that shortly after the shooting, the victim told a police officer defendant was the shooter. Hearsay is defined as an out-of-court statement offered in evidence to prove the truth of the matter asserted. MRE 801(c); *People v Bartlett*, 231 Mich App 139, 159; 585 NW2d 341 (1998). Hearsay is inadmissible except where exceptions or exclusions are provided by the Michigan Rules of Evidence. MRE 802.

The statement at issue is both an exception and an exclusion to the hearsay rule. First, it is an excited utterance "relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." MRE 803(2); *People v Anderson*, 209 Mich App 527, 535-536; 532 NW2d 780 (1995). Excited utterances are admissible as exceptions to the hearsay rule. *Id.* The victim's statement identifying defendant was made just after he had been shot in the face, had seen blood everywhere, and had felt his whole face going numb. He was, arguably, still under the stress of the event and the statement related to the event.

Second, the statement is admissible as non-hearsay because it was a (1) statement of identification, (2) made after perceiving the person, (3) by a declarant who was available at trial for cross-examination. MRE 801(d)(1)(C); *People v Malone*, 445 Mich 369, 384-385; 518 NW2d 418 (1994). A prior statement of identification may be reported by a third party, and it is irrelevant whether the statement is otherwise denied or affirmed at trial. *Id.* at 377. Here, the victim identified defendant to a police officer shortly after seeing defendant during the shooting. The police officer then reported the statement during his testimony. The victim also testified and was cross-examined by defense counsel. Therefore, the statement was not hearsay under MRE 801(d)(1)(C). For both of the above reasons the court did not err by admitting testimony regarding the statement.

Finally, defendant also argued he was denied the effective assistance of counsel because there was no objection at trial to the admission of the statement discussed above. The issue is not properly before this Court as it was not included in defendant's statement of questions presented. MCR 7.212(C)(5); *People v Brown*, 239 Mich App 735, 748; 610 NW2d 234 (2000). Regardless, the argument would fail. It was not error to admit evidence of the statement, and therefore, there was no mistake apparent on the record to support an ineffective assistance of counsel claim. Trial counsel is not required to make futile objections. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

We affirm.

/s/ David H. Sawyer
/s/ Jane E. Markey
/s/ Christopher M. Murray